IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 997

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., *Petitioners*,

v.

FEDERAL TRADE COMMISSION

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Southwest Automotive Distributors, Inc., and its members hereby respectfully move for leave to file a brief amici curiae in this case. The consent of the attorney for the petitioners has been obtained. The consent of the Solicitor General was requested, but refused. (See Appendix, p. 1a.)

Southwest Automotive Distributors, Inc. is a cooperative association organized, existing, and doing business under the laws of California. Members of the cooperative are independent automotive wholesalers (jobbers) engaged in the resale of automotive parts and supplies to the automotive retail trade in competition with the entire range of jobber distributors in the automotive replacement market, including dealer organizations of automobile manufacturers, oil and rubber company outlets, chain outlets, and other independent distributors. In its organization and method of doing business, the cooperative is functionally similar to Mid-South Distributors, Inc., and Cotton States, Inc., the petitioner cooperative associations herein.

*Amici* are respondents in a Federal Trade Commission action, Docket No. 6890, a proceeding analogous to the instant proceeding, instituted by complaint of the Federal Trade Commission. In that proceeding, unable to sustain

the burden of extended litigation, *amici* entered into a consent order agreement to cease and desist, effective March 27, 1959. That agreement expressly provided that it was entered for settlement purposes only and did not constitute an admission by respondents therein (*amici* here) that they had violated the law as alleged in the complaint. *Amici* are similarly situated with petitioners here and subject to the same competitive inhibitions, should the decision under review be affirmed. However, should the Commission order here be set aside by this Court, *amici* would then be in a position to invoke Rule 3.27(b) of the Commission's Rules of Practice for Adjudicative Proceedings, which establishes a procedure for modifying or setting aside pre-existing orders to cease and desist on the basis of changed circumstances of fact or law.

The Solicitor General, attorney for respondent, refused his consent to the filing of a brief amici curiae in a letter dated June 5, 1961. (App. p. 1a.) He asserts that Southwest Automotive Distributors, Inc., and its members, by agreeing to the consent order waived whatever rights they might have under Section 4 of the Robinson-Patman Act. This is not correct. The Section 4 exemption is statutory and even if it could be waived, it would be necessary to do so explicitly. Furthermore, the brief *amici curiae* would be submitted to assist this Court in reaching its decision by presenting a question which Southwest and its members believe should be before the Court, and which is not adequately presented by petitioners.

The impact of the Court of Appeals decision must be viewed against the background of the industry, the automotive parts replacement business. The ultimate consumer, the automobile owner, obtains replacement parts from a retail outlet. Generally, these outlets find it impossible to stock all parts for all cars. The replacement parts dealer must rely on his suppliers. Historically this was the independent jobber.

In recent years this traditional distribution pattern has been joined, and in major part overrun, by larger integrated competitors such as the auto manufacturers, oil and rubber companies, and chain outlets. Today only the small

independent repair shop relies primarily on the independent jobber, although 20 to 30 years ago this was equally true of car dealers, service stations, and chain stores. As auto manufacturers and oil and rubber companies integrated forward into retail functions they gradually confined the channels of distribution to their own organizations, depriving independent jobbers of large and hitherto openly accessible markets.

Independent jobbers supplying a limited number of dealer outlets found that the mass purchasing power of their integrated competitors enabled those competitors to purchase at prices unavailable to jobbers and to coerce price concessions from suppliers. This was a great competitive inequity to the jobbers who could not obtain the same low prices. In defense, cooperative associations such as petitioners and *amici* were created so that competition might be maintained.

## QUESTION NOT ADEQUATELY PRESENTED

### The Court Below Erred in Failing to Hold That the Charged Cooperative Practices Were Exempt Under Section 4 of the Robinson-Patman Act

While petitioners have fully pointed up the failure of the Court of Appeals to conform to the intent of Congress and to observe the proof standards of "knowledge" set forth in *Automatic Canteen*, they have mentioned but failed to develop the equally important issue involving Section 4 of the Robinson-Patman Act. The Court of Appeals summarily adopted the final decision of the Commission which superficially dismissed petitioner's contention that the practices charged in the complaint were exempt under Section 4 of the Robinson-Patman Act which provides that:

> "Nothing in section 13-13b, and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." (15 U.S.C. 13b).

The Commission held that:

> "[T]he reasoning of the Court in *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399-400 (1940), on this point in a Section 2(c) matter is equally applicable to a Section 2(f) matter. In other words, Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2(f), nor except them from its provisions." (R. 126)

The Court of Appeals agreed, stating:

> "The § 4 exemption has no such purpose. It recognizes cooperatives as valid organizations. But it does not turn the entity loose to acquire on behalf of its members, through the guise of group purchasing, price differentials or other preferences to which each would not otherwise be entitled."

The decision of the Commission as affirmed by the Court of Appeals below is a misapplication of the *Quality Bakers* doctrine and wholly avoids the scope of the Section 4 exemption. At no point have petitioners contended that Section 4 authorizes a cooperative association to violate Subsection 2(f), of the Clayton Act, as amended, [15 U.S.C. § 13(f)].

There is no claim here that the cooperative received an unlawful price discrimination: The gravamen of the Commission's complaint was that the members of the cooperative, through the receipt of patronage dividends, obtained an unlawful price discrimination—and this practice is precisely what is permitted under Section 4 of the Act. The right to participate, through shared savings, in the economies of cooperative operations is the bedrock rationale for the formation of cooperatives, and it was this right which Congress guaranteed in Section 4.

The economic stimulus to a cooperative form of business is the defensive need of small business units to enter into collective operations in order to achieve the economies and price advantages of joint operations. In enacting Section 4, Congress explicitly codified its intent to permit such activities without subjecting these enterprises to antitrust

liability in the event lower prices were received by members through the cooperative than otherwise might have been received outside the cooperative. The instant decision, superficially analogizing the practices herein to those condemned in the *Quality Bakers* case, confounds this legislative intent and constricts the core of lawful cooperative business activity.

## CONCLUSION

Petitioners do not adequately develop the vital question with respect to the cooperative exemption under the Act. The sole reference to this exemption is an element of knowledge under the basic charge. But scope and limitation of the cooperative exemption is of primary significance not only to amici (and petitioner) but to small businessmen throughout our economy who are joined together in bona fide cooperative ventures. In a real sense the Commission and Court of Appeals have read the cooperative exemption out of the statute. No such intention can be attributed to the Congress. This Court should now interpose its authority to correct this fundamental error and for the first time to give definition to this exemption.

The interest of amici is clear and vital. The filing of a brief amici curiae would be of value to the Court in reaching a judgment on the critical issues presented in this petition. We ask that this motion for leave to file a brief amici curiae be granted.

Respectfully submitted,

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## APPENDIX

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

102-995

June 5, 1961

Peyton Ford, Esq.
Ford, Larson, Greene and Horan
1000 Connecticut Avenue
Washington 6, D. C.

Re: Mid-South Distributors, et al. v. Federal Trade Commission—U.S. Sup. Ct., Oct. T., 1960, No. 997

Dear Mr. Ford:

You have requested, on behalf of Southwest Automotive Distributors, Inc., permission to file a brief *amicus curiae* in support of the petition for certiorari in this case. In that connection you submitted to me a memorandum indicating that the consent order entered by the Federal Trade Commission against your client raises issues which are the same as those presented in the petition in No. 997.

I am informed by the Federal Trade Commission that Southwest Automotive Distributors, Inc., and its members stipulated in their agreement for the consent order that they waived "all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement." In view of this stipulation, I do not believe that it would be appropriate for me to grant consent to the filing of a brief on behalf of Southwest Automotive Distributors, Inc. In challenging the order entered against the petitioners in No. 997, Southwest Automotive Distributors, Inc., would in effect be challenging the validity of the cease and desist order entered against it.

Sincerely yours,

ARCHIBALD COX
Archibald Cox
*Solicitor General*

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JAMES R. BROWNING, Clerk

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No. 114

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v.

FEDERAL TRADE COMMISSION

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## REPLY TO BRIEF IN OPPOSITION

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The brief in opposition filed by the Federal Trade Commission is unresponsive to the essential contentions of petitioners. By stating these contentions incorrectly, the Commission seeks to convert the legal questions presented in the petition into factual issues unsuitable for review by this Court.

A brief reply, we believe, is in order.

1. The brief in opposition obscures the issues presented by the petition by restating the question presented as one involving whether the finding of a violation of Section 2(f) by the Commission was "supported by the evidence" (Br. Opp. p. 2). The Com-